THE LAW OF PATIENT CONSENT
ITS RELEVANCE TO CHIROPRACTORS AND OSTEOPATHS

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Abstract: In 1992, the High Court of Australia handed down a decision on consent to medical treatment. The case had widespread media publicity, and caused consternation among many members of the medical profession. This article explains the law on consent to treatment by health practitioners and considers the relevance of the law for chiropractors and osteopaths.

Rogers v. Whitaker - Background

Mrs. Whitaker was approaching 50 when she decided to return to work, possibly as a nurse's aide. She had been blind in the right eye since an accident at the age of 9. After leading a fairly normal life, including marriage and raising a family, she was referred by her general practitioner to an ophthalmologist for an eye examination preliminary to returning to work.

Dr. Rogers (the defendant ophthalmologist) recommended an operation to the right eye, partly for cosmetic reasons, but also because there was a reasonable chance that he could restore significant sight. Mrs. Whitaker underwent surgery in August 1984. Within a few weeks, she began to lose the sight in her left (good) eye as a result of sympathetic ophthalmia, a complication of eye surgery which occurs approximately 1:14,000. By early 1986 she was blind.

Mrs. Whitaker sued Dr. Rogers alleging he had been negligent in failing to warn her of the risk of sympathetic ophthalmia and also alleging that his surgery was sub-optimal.

The Trial Judge rejected the claim that the surgery was poorly performed but found that Dr. Rogers had failed to properly warn Mrs. Whitaker about the risks connected with the surgery. Although the risk of blindness was small, the Judge said this had to be weighed against the gravity of its occurrence - in this case, the gravity was great. He awarded more than $800,000.00 in damages.

The New South Wales Court of Appeal dismissed the doctor's appeal (1), and so too did the High Court (2).

There was ample evidence before the Courts that Mrs. Whitaker had questioned Dr. Rogers about the risks connected with the surgery. The trial Judge described her questioning as "incessant" to the point of "irritation". Dr. Rogers gave evidence that he had not warned of the risk, even though he conceded that Mrs. Whitaker had wanted to know if there was **any** possibility of surgery-caused injury to her good eye. Dr. Rogers said he had not warned of the risk because he had not thought of it, even though he conceded it was the worst possible ophthalmic result.

Several eminent ophthalmic surgeons were called to give evidence about their usual practice in advising patients pre-operatively. 50% of the doctors said they would not have warned of the remote risk of sympathetic ophthalmia in Mrs. Whitaker's situation. The other ophthalmologists said they would have given such a warning.

The Court accepted the Plaintiff's evidence that if she had been warned of the risk of sympathetic ophthalmia she would not have undergone the operation.

The Rationale of the High Court Decision

Five Judges of the High Court gave a joint judgment. Mason C.J. (with whom Brennan, Dawson, Toohey and McHugh JJ agreed) found that Dr. Rogers owed Mrs. Whitaker a duty to exercise reasonable care and skill in providing advice and in diagnosis and treatment.

The Court noted that there was a division of opinion within the medical profession about whether the warning should have been given to Mrs. Whitaker. The Court recognized that when there is ample scope for a genuine difference of opinion about a matter involving medical expertise, a practitioner is not necessarily negligent because he/she gives different treatment from that of a group of other practitioners. But the Court said that the practices of individual doctors are irrelevant, when considering the duty of a practitioner to give advice on medical matters. The Court noted:

> " ... while evidence of acceptable medical practice is a useful guide for the Courts, it is for the Courts to adjudicate on what is the appropriate standard of care after giving weight to 'the paramount consideration that a person is entitled to make his own decisions about his life'." (3)

The Judges of the High Court said that a patient can only give valid consent to treatment if informed in broad terms about the nature of the intended procedure. To make the choice meaningful, the doctor must give relevant information and advice. The Court said:

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> "Because the choice to be made calls for a decision by the patient on information known to the medical practitioner but not to the patient, it would be illogical to hold that the amount of information to be provided by the medical practitioner can be determined from the perspective of the practitioner alone or, for that matter, of the medical profession. ... it is not a question the answer to which depends on medical standards or practices ... ". (4)

In reaching its decision favourable to Mrs. Whitaker, the majority of the High Court held:

> *"The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it."* (5)

Justice Gaudron, who gave a separate judgment, took an even more patient oriented approach. She rejected the view that prevailing medical practice should ever determine the legal standard of care. She said:

> "Even in the area of diagnosis and treatment there is ... no legal basis for limiting liability (by saying) that a doctor is not guilty of negligence if he or she acts in accordance with the practice accepted as proper by a responsible body of doctors skilled in the relevant field of practice." (6)
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> She also said:
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> "Leaving aside cases involving an emergency or circumstances which are special to the patient, the duty of disclosure ... extends at the very least to information that is relevant to a decision which entails a risk of the kind that would in other cases found a duty to warn. ... the duty to warn extends to risks of that kind involved in the treatment or procedures proposed." (7)

In finding for the Plaintiff, the Courts also accepted that because she had relied on the pre-operative advice of Dr. Rogers, there was the necessary causal link between his negligence and her injury. The fact that the surgery was purely elective made this finding more obvious.

Implications for Chiropractors and Osteopaths

Good communication with patients is not a traditional strength of the medical profession. Indeed, it is not all that long since medical practice was apparently governed by the rule "doctor knows best". Further, many medical practitioners are proceduralists, involved with invasive treatment. Because of the higher risks involved with invasive treatment, the Courts' emphasis on the need for proper pre-operative information might be thought reasonable.

But what relevance is this to chiropractors and osteopaths? After all, they are generally known for good patient rapport, and they do not perform invasive procedures.

(a) Assault

The most obvious relevance of the law on consent to chiropractic/osteopathic practice is that any unauthorised touching of the human body amounts, at law, to an assault. If a chiropractor or osteopath embarks on treatment to which a patient has not consented, the practitioner is exposed to the risk of criminal proceedings, as well as a claim for damages in the civil courts. The fact that the practitioner meant well, or even improved the patient's health, is no defence to a claim of assault, when treatment is given without a patient's consent.

By way of illustration, in the rather extraordinary facts of a Canadian case (8), a doctor administered a blood transfusion to an unconscious patient, brought into the hospital after a car accident. The transfusion was administered, even though the doctor was aware that the patient had, in her handbag, a card indicating she was a Jehovah's Witness, and did not want a blood transfusion. The doctor had no means of knowing whether, if conscious, the patient would have refused the transfusion, and he also relied on the emergency nature of the situation. It was not disputed that the patient would have died, without the transfusion.

The patient recovered and sued the doctor in assault. The Canadian Supreme Court found the doctor guilty and awarded C$20,000.00 in damages to the patient.

If a Court awards damages against a doctor who saves the life of his patient, how much more likely is a Court to award damages when non-invasive treatment is given without the patient's consent especially when there is no life threatening circumstance?

The first and most important legal aspect of any health treatment is that the patient must freely and voluntarily consent to it. Without consent, the treatment however

well-intentioned, is a legal assault. Therefore, chiropractors and osteopaths must first ensure that their patients understand the proposed treatment and agree to accept the treatment.

Even a general understanding by the patient is a defence to a claim of assault, but health practitioners are exposed to separate claims in negligence if they fail to properly advise their patients about the nature of proposed treatment, including its inherent risks, and its likely efficacy. Consent is an issue which raises questions of professional standards as well as freedom of patient choice.

(b) Negligence

A health provider has a separate duty of care to provide appropriate information to patients before treating them. This duty will be judged by the Courts applying lay, common sense standards, not by reference to the prevailing practices of the professional in question. The duty is comprehensively defined in the italicised passage (above) from the **Rogers v. Whitaker** decision.

A chiropractic or osteopathic practitioner must obtain consent before treating a patient. This means that the practitioner must properly advise the patient about the proposed course of treatment, so that the patient can make a free, voluntary and properly informed decision whether to proceed.

In some cases, it is reasonable to rely on the patient's presentation for treatment as evidence of the patient's consent. The patient's agreement to undergo treatment can be implied from the patient's conduct or statements. For example, if a regular patient undresses and says "doctor I guess you will want to work on my back" there is no need to undertake a lengthy explanation of the proposed examination if the chiropractor is planning to perform the same manipulation he/she has given the patient before.

On the other hand, a patient who infrequently attends for spinal manipulation, should be reminded of the risks and also warned of any change in the risks, since the patient last received treatment. For example, over 5 years, a person suffering from a degenerative condition, may become more vulnerable to the risks of a certain form of treatment. This should be explained, so that the patient can freely choose whether to accept the treatment in the changed circumstances.

If a patient suffers injury from a complication of spinal manipulation, the practitioner may be held liable, even though the manipulation was properly performed if the treatment has been given without proper consent and the patient can prove he/she would not have accepted the treatment if properly warned of the risks. The liability would arise from the practitioner's failure to properly advise the patient following the **Rogers v. Whitaker** principles.

Chiropractors and osteopaths, who provide only elective and non-emergency treatment, are particularly vulnerable to claims relating to treatment without adequate consent, as it is easier for their patients to prove that but for the pre-treatment advice (or lack of it), they would not have undertaken treatment. The position of the medical profession is somewhat different, as in many medical negligence cases, it is difficult for the patient to prove they would not have accepted treatment, if they had proper information about the risks. The refusal of treatment may well mean a guarantee of a poor outcome, often a worse outcome than actually materialised.

The National Health and Medical Research Council has published General Guidelines for Medical Practitioners on Providing Information to Patients (9). The guidelines were published after the **Rogers v. Whitaker** decision was reached and partly in response to it. Although the NH&MRC guidelines refer to medical practitioners, they are equally applicable to chiropractors. Not only do the guidelines specify the information to be given, but they also provide helpful comments on the way a practitioner should present information to a patient. If all health practitioners implement these guidelines, they are likely to meet the standard of care set by the Courts in **Rogers v. Whitaker**.

What documents should a chiropractor or osteopath use?

Good documentation is an important protective defence for health practitioners faced with legal action.

Commonly, medical practitioners use a "consent form" particularly before undertaking surgery. There has been widespread misunderstanding within the health professions, most particularly amongst nurses, about the role of consent forms. Some nurses still (erroneously) believe that a consent form <u>is</u> the patient's consent. At law, a consent form is nothing more than evidence of the patient's consent.

Chiropractors and osteopaths have not conventionally used consent forms, and there is no need to rush to adopt their use as in most cases the practitioners will be able to prove that consent to treatment can be implied from the patient's conduct. However, if a patient claims he or she has been treated without consent, the very best evidence available to a health practitioner is a signed consent form. The existence of such a document shifts the evidentiary position from the word of the patient versus the word of the practitioner, to a situation where the

practitioner has prima facie documentary evidence that consent was given. A patient would have great difficulty in succeeding in a claim of assault, if the practitioner can produce a signed consent form.

An even more potent source of evidence is the practitioner's notes. If the practitioner can produce a comprehensive note, taken at or about the time of the consultation with the patient, documenting the nature of the pre-treatment discussion with the patient, then this is of great probative value, and shifts the weight of the evidence in favour of the practitioner.

Practitioners are well advised to keep contemporaneous, accurate and comprehensive notes of their patient consultations, not only for legal purposes, but also because those notes form a valuable backdrop to future treatment. Of course, note taking should not be limited to consent issues. It should include details of each and every treatment given and any results of treatment.

Summary

The High Court has enunciated a clear statement of the law about a health practitioner's duty to warn of risks of treatment, before providing treatment. All health practitioners should ensure that they have properly assessed the unique needs of each patient for information before the patient consents to treatment.

Pamphlets, prepared for general use by a profession, have a place in assisting an individual professional to advise his/her patients; however, there is no substitute for properly tailoring information to the needs of the individual patient.

The aim is to ensure that each patient has sufficient, well-targeted, accurate advice to enable that person to make a deliberate, voluntary choice whether to accept recommended treatment. The greater the risk connected to a proposed treatment, the more careful the practitioner should be in giving information.

Practitioners are advised to be familiar with the NH&MRC guidelines on providing information to patients, and in ensuring that their individual practices meet, at the least, the standards implied by the guidelines.

Chiropractors and osteopaths should also carefully examine their record keeping practices. They should re-evaluate the desirability of using consent forms, particularly for spinal manipulation procedures. They should also ensure that their individual patient records are adequate, both for clinical and medico-legal purposes.

References

(1) Rogers v. Whitaker (1991) 23 N.S.W.L.R. 600.
(2) Rogers v. Whitaker (1992) 175 C.L.R. 479.
(3) Rogers v. Whitaker (1992) 175 C.L.R. 479 (p.487).
(4) Rogers v. Whitaker (1992) 175 C.L.R. 479 (p.489).
(5) Rogers v. Whitaker (1992) 175 C.L.R. 479 (p.490).
(6) Rogers v. Whitaker (1992) 175 C.L.R. 479 (p.493).
(7) Rogers v. Whitaker (1992) 175 C.L.R. 479 (p.494).
(8) Malette v. Shulman (1991) 2 Med L.R. 162.
(9) National Health and Medical Research Council: General Guidelines for Medical Practitioners on Providing Information to Patients. NH & MRC Canberra June 1993 (copies available by 'phone request (06) 289-7646 or fax (06) 289 7802).